

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Unlicensed Operation in the TV Broadcast Bands	)	ET Docket No. 04-186
	)	
Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band	)	ET Docket No. 02-380
	)	

To: Marlene H. Dortch, Secretary  
Office of the Secretary

**JOINT COMMENTS IN SUPPORT OF "EMERGENCY REQUEST"**

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters, Oregon Association of

Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, Wyoming Association of Broadcasters (collectively, the "State Associations"), by their attorneys in this matter, hereby jointly comment in strong support of the "Emergency Request" filed on October 17, 2008 in this proceeding by The Association for Maximum Service Television, Inc., The National Association of Broadcasters, The Walt Disney Company, NBC Universal, Inc., CBS Corporation, News Corporation, The Open Mobile Video Coalition, and The Association of Public Television Stations (collectively, the "Petitioners"), urging the Commission to issue a public notice seeking comment from members of the public on the "White Spaces" report released by the Office of Engineering and Technology ("OET") on October 15, 2008 (the "OET Report") before deciding whether to adopt a *Report and Order* authorizing the use of such "White Spaces."

This proceeding involves the possible release of millions of unlicensed, RF-emitting, interfering, personal and portable wireless devices operating on digital channels adjacent to those used by the television industry. If allowed by the FCC, manufacturers throughout the world will seek to sell millions of those devices for use in every nook and cranny of our Nation, in homes, apartments, offices, schools, parks, playgrounds, vehicles, etc. throughout the United States. Once the devices are "out there" *causing billions of random acts of harmful interference* to television sets, converter boxes, digital-ready cable sets and wireless microphones, it will be impossible to track them down and put a stop to the spreading electronic contagion.

Television broadcasters, as well as cable operators and wireless microphone users, are extremely concerned about the Commission's apparent rush to judgment in this proceeding. Testing by the Commission's own OET demonstrates that the spectrum-sensing technology used in the test devices simply does not reliably stop those devices from interfering with broadcasters' ability to disseminate, *and with the public's ability to receive*, high quality, interference-free, digital signals from any of the thousands of television stations upon which our Nation relies for emergency alerts and advisories, news, and other valuable information. Moreover, once distributed nationwide, those devices will likely disrupt the ability of millions of people to receive their television programming without any effective system of accountability.

Despite the alarming results of OET's testing, which were published only very recently without any opportunity for public comment, and despite the lack of any system of meaningful accountability, the full Commission is being asked to decide whether to adopt a *Report and Order* which would allow this potential *electronic virus* to spread throughout the country. Appropriately therefore, the Petitioners are urging the Commission to issue a public notice seeking comment from members of the public on the OET Report before any further action is taken by the Commission in this proceeding.<sup>1</sup>

The State Associations submit that the Commission's refusal to await public input before proceeding with a *Report and Order* would constitute at least two acts of "arbitrary and capricious" conduct fatally undermining any action that the Commission may seek to take under a *Report and Order*.<sup>2</sup> The FCC has a consistent policy and practice of allowing interested parties a meaningful opportunity to review and comment upon the kind of substantively pivotal

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<sup>1</sup> The Petitioners have requested that initial comments be due within 45 days of the release of such public notice and that reply comments be due 25 days thereafter.

<sup>2</sup> The Administrative Procedure Act allows the Courts to overturn any action by the FCC that it determines to be "arbitrary and capricious." 5 U.S.C. § 706(2); *see* 28 U.S.C. § 2342(1). Per force, the FCC is statutorily barred from taking any action that is "arbitrary and capricious."

report that OET has just published, before taking action based on such report.<sup>3</sup> Denying interested parties a timely opportunity to comment on the public record violates the principle of due process that is at the heart of the Administrative Procedure Act.<sup>4</sup> Furthermore, by denying the public such a comment opportunity the Commission is also departing from its customary policies and practices for which there can be no reasonable justification.<sup>5</sup> In short, we submit that any action to adopt a *Report and Order* before the Commission gives due consideration to public comments on the OET Report will render such *Report and Order* fatally defective from the start. Compounding those serious legal concerns are these important questions:

*Why the rush* given that the Commission, through its OET, gave the proponents many, many, months to get it right, by trying to design and test devices that the proponents represented would protect the right of the public to interference-free digital television signals. Yet, the OET Report shows that *not one* of those devices, which were engineered by technologically savvy proponents, will insure adequate protection to the millions of viewers who expect and demand

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<sup>3</sup> See Public Notice, *FCC Releases Staff Final Report "Spectrum Study of 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems" Seeks Comments on Final Report in Pending Spectrum Allocation Proceeding*, ET Docket No. 00-258, 16 FCC Rcd 10272 (rel. Mar. 30, 2001); Public Notice, *Media Bureau Seeks Comment on Experimental Economics Study Examining Horizontal Concentration in the Cable Industry*, CS Docket No. 98-82, et al., 17 FCC Rcd 10544 (rel. June 3, 2002); Public Notice, *Comment Sought on National Radio Systems Committee DAB Subcommittee's "Evaluation of the iBiquity Digital Corporation IBOC System,"* MM Docket No. 99-325, 16 FCC Rcd 22436 (rel. Dec. 19, 2001); Public Notice, *FCC Seeks Comment on Research Studies on Media Ownership*, MB Docket No. 06-121, 22 FCC Rcd 14313 (rel. July 31, 2007); Public Notice, *Comments Requested on The MITRE Corporation Report on Technical Analysis of Potential Harmful Interference to DBS from Proposed Terrestrial Services in the 12.2-12.7 GHz Band*, ET Docket 98-206, 16 FCC Rcd 8417 (rel. Apr. 23, 2001); Comments Sought on Use of Separate Antennas to Initiate Digital FM Transmissions, DA 03-3898, 18 FCC Rcd 25676 (rel. Dec. 8, 2003); Public Notice, *The Office of Engineering and Technology Announces the Release of Reports of Initial Measurements on TV White Space Devices*, ET Docket No. 04-186, 22 FCC Rcd 13846 (rel. July 31, 2007).

<sup>4</sup> See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir 2008) (recognizing the importance of seeking notice and comment on a technical report).

<sup>5</sup> *CBS Corporation v. Federal Communications Commission*, 535 F.3d 167 (3rd Cir. 2008) ("Like any agency, the FCC may change its policies without judicial second-guessing. But it cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure. Because the FCC failed to satisfy this requirement, we find its new policy arbitrary and capricious under the Administrative Procedure Act ....").

high quality, interference-free television reception. Indeed the potential for harmful interference to viewers' digital television sets has been calculated to include 77% of a station's service area.<sup>6</sup>

*Why the rush* given that, once these devices are disbursed throughout America, it will be impossible to track them down and hold their owners accountable? Commission action allowing such devices to invade America has all the earmarks of an *electronic interference tsunami* which will cause millions of viewers to overburden the resources of television stations and government with complaints. The Congress, the FCC, and very likely state and local law enforcement, will be inundated with potentially millions of complaints from members of the public looking for the causes of interference to their television sets. The situation could get even worse over time. While acknowledging that the FCC is initially proposing 40 milliwatts of power for these devices (this level is even too high given that the location of the device will be the key determinant of whether it causes interference), the representative of a proponent recently proclaimed that "we're going to push that up over time."<sup>7</sup> The spokesperson for another proponent stated that "the FCC is going to start conservatively, but we're going to wear them down. In a few years, we're going to be at 10 W[atts] all over the place."<sup>8</sup>

*Why the rush* when everyone is working tirelessly to ensure that the DTV transition goes as smoothly as possible? It will take many months, and possibly years, after the February 17, 2009 analog cutoff for the DTV facilities landscape to settle down. The reception experiences of viewers will require stations to adjust their facilities to assure robust digital signals to all who have traditionally enjoyed coverage. The release of millions of unlicensed, interference causing devices during this period will only serve to confuse and concern DTV viewers and frustrate the

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<sup>6</sup> See "Supplement to Emergency Request" filed by Petitioners in this proceeding on October 22, 2008, p. 4

<sup>7</sup> See "Clear All TV from Spectrum for Wireless Broadband, Says New America," *Communications Daily* (Oct. 22, 2008).

<sup>8</sup> *Id.*

efforts of television stations to cure any DTV problems that have emerged during the process of finalizing the DTV transition.

*Why the rush* at this fragile time in our economy? By circumventing the spectrum auction process, the proponents are asking the Federal government, via the FCC, for essentially a free give-away of spectrum to be used for their potentially harmful devices, at a time when the Federal government can least afford such largess.

What is at stake in this proceeding is no less than the integrity and viability of America's free, local, over-the-air television broadcasting industry, including the digital television transition. The *sine qua non* of every broadcast station in America is its consistently high quality, interference-free signal. Unless the general public is able to reliably experience, day in and day out, high quality, interference-free, digital television service, there will be no robust future television broadcast industry upon which the government and the general public will be able to rely as their primary, indispensable source of emergency information and of programming responsive to local communities. Accordingly, much is at stake in this proceeding. By failing to safeguard the signal integrity of broadcast stations, the FCC risks violating its most fundamental statutory mandate "to make available...to all the people of the United States,...a rapid, efficient, Nation-wide,...radio communications service...for the purpose of the national defense, [and] for the purpose of promoting safety of life and property...."<sup>9</sup>

Finally, *why the rush* given the calamitous legacy which would be left by the present Commissioners to the new Administration, to those who take their places at the FCC, and to the general public who rely so heavily upon the Nation's preeminent broadcast industry?

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<sup>9</sup> 47 U.S.C § 151.

Based on the foregoing, the State Associations respectfully urge the Commission to grant in full the Emergency Request filed by the Petitioners and not take any action in this proceeding until the comments and reply comments have been filed and duly considered by the Commission.

Respectfully submitted,

**THE NAMED STATE BROADCASTERS ASSOCIATIONS**

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